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Supreme Court of the United States

OCTOBER TERM, 1951.

No. 147.

WABASH RAILROAD COMPANY, A CORPORATION,
PETITIONER,

VS.

GORDON BYLER, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Wabash Railroad Company (in whose favor the jury returned a verdict), respectfully petitions for a writ of certiorari to review a final judgment and decision of the United States Court of Appeals for the Eighth Circuit, reversing a judgment in favor of petitioner entered in the District Court of the United States for the Western District of Missouri, Western Division, and remanding the cause to that court with directions to grant respondent a new trial. The action was based on neg-

ligence under the Federal Employers' Liability Act as amended August 11, 1939 (Title 45, U. S. C., Sec. 51 *et seq.*), and on a violation of the Safety Appliance Act (Title 45, U. S. C., Sec. 11), to recover damages for personal injuries received by him on August 17, 1949 (R. 1, p. 2).* The style of the case in the United States Court of Appeals is: "Gordon Byler, Appellant, vs. Wabash Railroad Company, a corporation, Appellee, No. 14,382." The opinion is reported 196 F. 2d 7 (Advance Sheets) and appears in the Record (R., p. 4). The opinion of the trial court in overruling plaintiff's motion for new trial is reported 96 F. Supp. 16. The judgment and decision of the United States Court of Appeals became final on May 23, 1952, the date on which petitioner's Motion for Rehearing was denied (R., p. 21), and petitioner has exhausted its remedies in the United States Court of Appeals.

I.

SUMMARY AND SHORT STATEMENT OF MATTER INVOLVED.

On August 17, 1949 (the Court erroneously states April 17), respondent (plaintiff), Gordon Byler, a switchman in the employ of petitioner (defendant) at its switch yards in Kansas City, Missouri, was standing between a

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*In the Record here as prepared by the Clerk of the United States Court of Appeals for the Eighth Circuit, the Record filed in that court by appellant is given the number "1," although it contains 83 pages. Matters referred to which are found in that record will be referred to as "R. 1, p. ____." The Supplemental Record is given the number "2," although it contains 9 pages. Matters referred to which are found in the Supplemental Record will be referred to as "R. 2, p. ____." Proceedings in that court after the filing of the Supplemental Record are given the page numbers 3 to 22, and will be referred to as "R., p. ____."

string of twelve or fourteen standing cars to the west of him, and three cars attached to the switch engine to the east of him (R. 2, p. 2). The three cars were cut off from the engine to run west down grade to the standing cars. As the three cars moved past respondent, he boarded the stirrup on the ladder at the east end of the east car to climb to the brake platform and apply the brake (R. 2, p. 2). The moving cars collided with the standing cars and respondent was thrown off the brake platform and injured. Petitioner will be referred to herein as "defendant," and respondent will be referred to as "plaintiff."

There was evidence by Byler that he was standing six car lengths east of the standing cars (R. 2, p. 4); that he boarded the east end of the three moving cars as they moved west, which put the west end of the three moving cars three car lengths from the standing cars at the time the east end of the moving cars passed him (Glass testified that there were two car lengths between the moving and standing cars when Byler boarded the cars) (R. 2, p. 7); that the moving cars were traveling ten to twelve miles per hour when they passed him, and picked up speed (R. 2, p. 2). He took a hop or two, boarded the cars, and climbed the ladder to the brake platform (R. 2, p. 3). He further testified that it took him five seconds to climb the ladder, and two or three seconds to tighten the brake (R. 1, p. 30), and that it would take a car length or a car length and a half to stop the cars after the brake was applied (R. 2, p. 4). Another witness, Clark Cary, testified that it would take sixteen or seventeen seconds to reach the brake platform and six car lengths to stop the cars moving at ten miles per hour after the brakes were applied (R. 1, pp. 42, 43). At another place in his testimony, plaintiff testified that the cars were moving six or seven miles per hour as they passed him, and that the standing cars

were six or eight car lengths from the place where he was standing (R. 2, p. 3). He testified that he revised his statement made in his deposition as to a speed of ten or twelve miles per hour when the cars passed him, to five or six miles per hour at the trial, because of what others said as to the speed of the cars, twelve days before the trial, but that it was his judgment, uninfluenced by what others said, that the cars were moving ten or twelve miles per hour when they passed him (R. 2, p. 4). There was no rule requiring him to get on cars while in motion, and his foreman did not tell him to get on (R. 1, pp. 32, 33).

The complaint is based both on negligence under the Federal Employers' Liability Act, in that the three cars were kicked at an excessive rate of speed, and on a violation of the Safety Appliance Act, in that the hand brake on the east end of the east car was defective (R. 1, p. 2). The answer of defendant denied the allegations of the complaint and alleged that the plaintiff knew the speed of the moving cars and the other conditions there existing, but failed to exercise ordinary care for his own safety in boarding said cars, which caused or contributed to whatever injuries he may have received (R. 1, p. 3).

The issues of defendant's negligence and of plaintiff's contributory negligence were in the case at the time the answer was filed, at the time defendant's opening statement was made, and during the time all the evidence was introduced, as is shown by an instruction requested by plaintiff at the close of the evidence (R. 1, p. 52). In fact, those issues were in the case throughout the trial, until the trial court, by its charge, submitted the case to the jury on violation of the Safety Appliance Act by defendant and on plaintiff's negligence as the sole cause of his injury. Plaintiff's negligence as the sole cause of his injury was an issue in the case at all times.

The Court in its opinion overlooked the fact that those issues were in the case. The case was decided as though the complaint were based solely on a violation of the Safety Appliance Act. This is shown in the opening paragraph of the opinion, where the Court states that the action was brought under Sec. 11, Title 45, U. S. C. (The Safety Appliance Act) (R., p. 4). It also appears in the opinion that the Court overlooked those issues in its discussion of defendant's opening statement and its discussion of the admissibility of evidence bearing on plaintiff's negligence, where the Court said (R., p. 7):

> "It is apparent from the record in this case that counsel for the defendant did not have in mind the limitations imposed by the Safety Appliance Act on defenses to actions for personal injury as in his opening statement, before the introduction of any evidence, he stated that he proposed to show that when plaintiff began to work for the defendant and at the time he made his application for employment, the nature of his work was explained to him and that 'the dangers inherent in that work to a person not using caution for his own safety, or to a person who exercises bad judgment or is careless, were explained fully to Mr. Byler and the evidence will be that in that type of work there is certain danger inherent.' This was objected to on the ground that it was on the border of assumption of risk, but counsel for defendant states:
>
> " 'I want to tell this jury that the evidence will show that Mr. Byler knew what to expect from the Railroad if he didn't exercise his own judgment. I don't propose to tell them that if the Railroad was negligent they were not liable.'
>
> " 'The Court: No. Very well. That is on the question of *contributory negligence*' (Emphasis supplied).
>
> "Consonant with this theory of defense urged at the very inception of the trial by counsel for the

> defendant he was permitted over objection to cross examine plaintiff relative to a written application signed by him when he entered the employ of the Railroad Company. * * *"

Immediately following the statement of the trial court in the above quotation, "That is on the question of contributory negligence," counsel for defendant stated that it was also on the question of plaintiff's negligence as the sole cause of his injury, to which the trial court replied, "Yes. Very well" (R. 1, p. 6).

The evidence with respect to plaintiff's application for employment, to which the Court referred in the above quotation and which is hereinafter set out, was offered for the following purposes: (a) to rebut plaintiff's testimony that he did not know of any specific occasion on which any official told him that it was a dangerous job and that there would be many situations where he would have to make decisions that might involve him in danger if he made the wrong decision (R. 1, p. 34); (b) on the issue of contributory negligence, which was then in the case, because negligence under the Federal Employers' Liability Act was then an issue; and (c) on the issue of plaintiff's negligence as the sole cause of his injury, which was a complete defense both to plaintiff's allegations of defendant's negligence and to his allegations of violation by the defendant of the Safety Appliance Act.

In discussing the admissibility of that evidence, it clearly appears from the opinion of the Court that the Court was under the misconception that the case was brought solely under the Safety Appliance Act. In the opinion, the Court said (R. pp. 8, 9):

> "This testimony went directly to the issue of assumption of risk, which is not a defense in such an

action. *It may also have been pertinent to the question of plaintiff's contributory negligence, which of course is not a defense in an action based upon the Safety Appliance Act*" (Emphasis ours).

With respect to the testimony, the following occurred in the cross examination of plaintiff, Byler (R. 1, pp. 33-36):

"Q. Now, you knew and had it explained to you, Mr. Byler, did you not, at the time that you were employed by the Wabash that there were certain dangers in connection with switching cars?

"A. Oh, yes.

"Q. And you had it explained to you that this was going to be a job in which your judgment— (Tr. 159)

"Mr. Robertson (Interrupting): Now, just a moment, Your Honor. Again counsel is getting into assumption of risk questions in the face of the law which clearly says there can be no assumption of risk in a Federal Employer Liability action or Safety Appliance action. Whether he knew it was the most dangerous job in the world does not enter in.

"The Court: Objection overruled. He can answer the question (Tr. 160).

"Q. Would you read him the question, please? (Question (fol. 23) read) (Continuing)—would have to be used under many situations, that without any fault on anybody else's part that you would have to make decisions that might or might not involve danger to yourself if you made the wrong decision?

"A. Why, I don't know there was ever any specific occasion where some official told me I was taking a dangerous job and might lose life or limb; no, I don't think that happened. Of course we know it isn't like cutting out paper dolls. There is some danger inherent like there is driving your car down town.

"Q. I hand you an application for employment on the back of which purports to be your signature and ask if that is your signature below this printed statement here that is filled in the blank?

"A. That's right.

"Q. That has been marked Defendant's Exhibit 2, and it states just above your signature: 'Mr. Foster, in the employ of the Wabash Railroad Company, General Yardmaster, has this day informed me the duties connected with the employment I am about to undertake, that of switchman, and has explained to me that the performance of said duties will expose me to great dangers, the risk of which I assume to myself without fault—

"Mr. Robertson (Interrupting): Just a minute. If Your Honor please, I say he cannot be held to assumption of any risk (Tr. 161).

"Mr. Hardy: We understand if any risk on the Company or employees, it is no defense, but I am talking merely about assuming the risk of his own judgment. That is all covered.

"The Court: Yes.

"Mr. Robertson: Again I take serious objection to it. The Federal Employer's Liability Act, as Your Honor knows, says that no contract or understanding or anything notwithstanding shall abrogate its effects.

"The Court: That would apply within his line of duties. If he went into an extra duty, that is did something that was not within his duty to perform—

"Mr. Hardy (Interrupting): That's right.

"(fol. 24) The Court (Continuing):—then of course it would be a defense.

"Mr. Hardy: And that is our defense in this case (Tr. 162).

"Mr. Robertson: No, sir, the wording here, Your Honor—I wish to read it to the Court again. This says, '—and has explained to me that the performance of said duties will expose me to great danger.' Of course all of us know Railroad work is dangerous.

"The Court: Yes.

"Mr. Robertson: Then it proceeds to say: '— the risk of which I assume for myself,' which is in exact opposition to the Federal Employer's Liability Act, Your Honor.

"Mr. Hardy: It is not asserted as a legal defense to any negligence, if there is any negligence that would cause this thing, but we are saying it was his sole judgment, his own bad judgment that caused the—

"The Court (Interrupting): Yes.

"Mr. Robertson: Furthermore, Your Honor, I wish to make my objection here—

"The Court (Interrupting): I am sustaining your objection to that. I am explaining to the Jury as far as that contract is concerned, the Company can't plead the assumption of risk.

"Mr. Hardy: That is correct.

"The Court: You do not plead assumption of risk here.

"Mr. Hardy: No, sir, we do not plead it nor rely on it.

"The Court: But if he did something wholly apart from his assigned duties, then your point is he takes the risk for that?

"Mr. Hardy: That is exactly right, Your Honor.

"The Court: Yes (Tr. 163).

"Q. Proceeding (reading): 'and that I must use proper and constant care to avoid injury to myself and others. I have received and will read the Book of Rules and Regulations of said Railroad Company and promise to make myself familiar with them and agree to be governed by them and such additions thereto and alterations thereof as may from time to time be made. I have also received a list of danger points or places where special care is required by trainmen to prevent collisions with bridges above or obstructions on side of track and the terminal division (fol. 25) of said Railroad and agree to take notice of all bridges

and obstructions and so perform my duty as not to be injured by them. It is understood and agreed that my employment'—the rest of it pertains only to your probationary period, if you want to read it. It has nothing to do with the case involved, the form of probation until he is accepted."

At the time that evidence was introduced, both contributory negligence and plaintiff's negligence as the sole cause of his injury were issues in the case. The trial court and counsel for defendant made it clear to the jury, as shown above, that assumption of risk was not an issue in the case, and the objection to the contract or application was sustained in so far as that issue was concerned. In addition, under the court's charge, which submitted the case solely on violation of the Safety Appliance Act, the jury was required to find for the plaintiff if it found only two things, namely, inefficiency of the brake and causal connection; and could only find for defendant if it found that plaintiff was negligent in getting on the cars at the time and place he did, and that his negligence was the sole cause of the accident (R. 1, pp. 60, 61). There is nothing in the charge from which the jury could even infer that either assumption of risk was a defense or that contributory negligence was then an issue in the case.

At no place in the opinion does the Court recognize that plaintiff's negligence as the sole cause of his injury is a complete defense in a Safety Appliance case. The effect of the opinion is that evidence of plaintiff's negligence is not admissible in a Safety Appliance case.

Another matter involved is that the Court's charge as a whole fairly submitted the case to the jury. Plaintiff's contributory negligence and defendant's negligence dropped out of the case, and the case was submitted on violation of the Safety Appliance Act by defendant and

plaintiff's negligence as the sole cause of his injury. In this connection, the criticisms of the trial court's charge should be considered.

(a) The Court criticized the trial court's instruction (R., p. 10) for failure to instruct the jury "that if the inefficiency of the hand brake contributed to the injury as one of the proximate causes thereof, recovery might be had." The Court overlooked the fact that there was no issue in the case of partial causation. This is disclosed by the complaint (R. 1, p. 2), plaintiff's opening statement (R. 2, p. 1), and plaintiff's failure to object to the court's instruction on that ground, as required by Rule 51 of the Federal Rules of Civil Procedure, which requires specific objections to the court's charge before the jury retires to consider its verdict. The only objections made by the plaintiff to the court's charge are found the Record (R. 1, pp. 67, 69, 70).

(b) The Court also said that the trial court's instruction was subject to criticism "* * * in that it is there stated that if under the circumstances the cars could not have been stopped even if the brake had functioned efficiently, plaintiff could not recover" (R., p. 11). The Court then said: "The jury, however, might have believed that even if the cars might not have been stopped, their speed could have been so retarded as to reduce the jar on impact that it would not have caused plaintiff the injury which he in fact suffered." In making that criticism the Court overlooked that part of the instruction in which the trial court charged the jury that if an efficient hand brake would have "avoided the collision or at least a collision of the severity that would cast him or throw him from the car, then in those circumstances plaintiff is entitled to recovery" (R. 1, p. 60). There is little difference between

the language of the trial court and that of the Court of Appeals, both quoted above.

(c) The Court also criticized the instruction of the trial court for failure to give the jury a negative instruction that contributory negligence was not a defense (R., p. 11). The Court overlooked the trial court's instruction (R. 1, pp. 60, 61), which clearly and simply required the jury to return a verdict for plaintiff if it found that the brake was inefficient, and that there was causal connection; under the trial court's charge, a verdict could only be returned for defendant if the jury found plaintiff negligent and that his negligence was the sole cause of the accident. Under the trial's court's instruction, contributory negligence was in no wise involved.

The Court then quoted an isolated sentence from *O'Donnell* v. *Elgin, Joliet & Eastern Ry. Co.*, 338 U. S. 384, in which it is stated that all issues of negligence had been swept out of cases under the Safety Appliance Act. The Court completely overlooked the fact that the negligence of the plaintiff as the sole cause of the accident is a complete defense, and that the negligence which has been swept out of Safety Appliance Act cases is negligence of the railroad or its employees other than the plaintiff. The Court also overlooked the fact that no objection was made to the trial court's charge on that ground, as required by Rule 51 of the Federal Rules of Civil Procedure (R. 1, pp. 67, 69, 70).

(d) The Court also criticized the trial court's instruction because it did not specifically give the jury a negative instruction that assumption of risk was not a defense. The Court overlooked the fact that both the trial court and defendant's counsel told the jury that assumption of risk was not pleaded and not relied on and that it was not

a defense in the case (R. 1, pp. 33-36). The jury was required to bring in a verdict for plaintiff if it found an inefficient brake and causal connection, and could only return a verdict for defendant if it found plaintiff negligent, and that his negligence was the sole cause of the accident.

II.

STATEMENT AS TO JURISDICTION.

The jurisdiction of this Court is invoked under Title 28, U. S. C., Sec. 1254, to review a judgment of the United States Court of Appeals for the Eighth Circuit, rendered in the case of Gordon Byler, Appellant, vs. Wabash Railroad Company, a corporation, Appellee, No. 14,382, reversing and remanding a judgment in favor of petitioner rendered by the United States District Court for the Western District of Missouri, in an action under the Federal Employers' Liability Act as amended August 11, 1939, Title 45, U. S. C., Sec. 51 *et seq.*, and under the Safety Appliance Act, Title 45, U. S. C., Sec. 11. The opinion is reported 196 F. 2d 9 (Advance Sheets), and appears in the Record (R., pp. 4 *et seq.*).

The judgment of the United States Court of Appeals denies petitioner's rights, which it claimed and to which it was entitled, under the Federal Employers' Liability Act and the Safety Appliance Act.

On May 1, 1952, the opinion was handed down and an order entered remanding the cause to said United States District Court (R., pp. 4, 12). On May 14, 1952, and in due time, petitioner filed its motion for rehearing in said Court of Appeals (R., p. 19), which motion was denied on May 23, 1952 (R., p. 21). On motion of petitioner for a

stay of the mandate, pending petition to this Court for a writ of certiorari, an order was entered on June 2, 1952, staying the mandate for thirty days from June 2, 1952, and providing that if there is filed a certificate of the clerk of this Court with the clerk of said Court of Appeals that a petition for writ of certiorari, record, and brief have been filed within said thirty-day period, the stay granted shall continue until final disposition of this case by this Court (R., p. 21).

III.

QUESTIONS PRESENTED.

1. The complaint alleged negligence of defendant under the Federal Employers' Liability Act, and a violation of the Safety Appliance Act (R. 1, pp. 1, 2). The answer contained a general denial and a plea that plaintiff's negligence caused or contributed to the accident (R. 1, pp. 3, 4). This was the status of the issues at the time defendant's opening statement was made, and during the time that all of the evidence was introduced, as shown by an instruction requested by plaintiff at the close of the evidence (R. 1, p. 52).

(a) Did the Court of Appeals deny defendant its rights under the Federal Employers' Liability Act in stating that contributory negligence was not an issue in the case (under Title 45, U. S. C., Sec. 53, it was an issue on mitigation of damages), and for that reason holding erroneous certain rulings of the trial court overruling plaintiff's objections to defendant's opening statement and to defendant's evidence, which bore directly on plaintiff's contributory negligence?

(b) Did the Court of Appeals deny defendant's rights under the Federal Employers' Liability Act and the Safety Appliance Act in holding erroneous certain

rulings of the trial court overruling plaintiff's objections to defendant's opening statement and to defendant's evidence, which bore directly on plaintiff's negligence as the sole cause of his injury and was a complete defense under both acts?

2. Did the Court of Appeals, by not mentioning in its opinion (R., pp. 4 *et seq.*) the fact that the complaint was based on negligence of defendant under the Federal Employers' Liability Act as well as a violation of the Safety Appliance Act, deny defendant's rights under the Federal Employers' Liability Act by holding that contributory negligence was not an issue in the case, even though pleaded by defendant? (R. 1, pp. 3, 4.)

3. Is negligence of the plaintiff as the sole cause of his injury a complete defense in an action based on violation of the Safety Appliance Act, and does the opinion of the Court of Appeals deny defendant the right to make that defense, where no mention of plaintiff's negligence as the sole cause of his injury is made in that Court's opinion (R., pp. 4 *et seq.*), and where the Court states that all issues of negligence have been swept out of cases under the Safety Appliance Act? (R., p. 12.)

4. In discussing the admissibility of evidence elicited on the cross examination of the plaintiff in regard to his application for employment, does the Court, where it states that the evidence might have been "pertinent to the question of plaintiff's contributory negligence, which, of course is not a defense in an action based upon the Safety Appliance Act" (R., pp. 8, 9), deny defendant its rights under the Federal Employers' Liability Act, when contributory negligence was an issue in the case at the time the evidence was offered by defendant and admitted by the trial court? If it was pertinent on plaintiff's contributory negli-

gence, was it not pertinent on plaintiff's negligence as the sole cause of plaintiff's injury?

5. Did the charge of the trial court as a whole fairly submit the case to the jury, where it *required* a verdict for the plaintiff if the jury found a violation of the Safety Appliance Act, and causal connection, and where the jury could only return a verdict for the defendant if it found that plaintiff was negligent and that his negligence was the sole cause of his injury? Should a verdict for the defendant be set aside, where the issues were so presented in the trial court's charge? (R. 1, pp. 60, 61.)

6. Have all issues of negligence been swept out of cases under the Safety Appliance Act? *O'Donnell* v. *Elgin, Joliet & E. R. Co.*, 338 U. S. 384, states that they have. Does this include plaintiff's negligence as the sole cause of the accident? *Carter* v. *Atlanta St. A. B. R. Co.*, 338 U. S. 430, holds that there must be causal connection between the defective appliance and the accident. Plaintiff's negligence as the sole cause of the accident destroys that causal connection. *Detroit, T. & I. R. Co.* v. *Hahn*, 47 F. 2d 59 (6 Cir.), cited in *Myers* v. *Reading Co.*, 331 U. S. 477, holds that plaintiff's negligence as the sole cause of the accident is a complete defense. *Lang* v. *N. Y. C. R. Co.*, 255 U. S. 455.

7. In Safety Appliance cases, if plaintiff's *conduct*, whether negligent or not, is the sole cause of the accident, is not that a complete defense? If so, did not defendant assume a greater burden than necessary in seeking to establish plaintiff's conduct as negligence, and is not the trial court's charge more favorable to plaintiff than he was entitled to under the law, when it placed a greater burden on defendant than necessary for a complete defense, by requiring the jury to find that plaintiff's conduct was negligent?

8. Did not the statements of defendant's counsel that assumption of risk was not pleaded nor relied on, the actions of the trial court in so telling the jury, and the trial court's charge to the jury in which the issues were set forth as in paragraph 5 above, make it clear that assumption of risk was not a defense in the case? (R. 1, pp. 33-36, 60, 61).

9. Is it necessary for the trial court to give a negative instruction advising the jury that assumption of risk and contributory negligence are not issues in the case, under the circumstances set forth in paragraphs numbered 5 and 8 above?

10. Under the opinion of the Court of Appeals, if this case has to be retried, is it the law of the case that contributory negligence is not an issue, even though the complaint is based in part on negligence under the Federal Employers' Liability Act? (R. 1, pp. 1, 2.) Is it the law of the case that plaintiff's negligence as the sole cause of his injury is not a defense to plaintiff's claims, both under the Federal Employers' Liability Act and the Safety Appliance Act?

11. Can Rule 51, Federal Rules of Procedure, Title 28, U. S. C., which requires specific objections to the court's charge, be ignored, as the Court did on two of its criticisms of the trial court's charge?

IV.

REASONS RELIED ON FOR ISSUANCE OF THE WRIT.

1. Plaintiff's contributory negligence was an issue in the case on plaintiff's allegation of defendant's negligence under the Federal Employers' Liability Act, at the time

the opening statement was made and during the time that all of the evidence was introduced. The Court of Appeals not only failed to recognize that this issue was in the case, but expressly stated in its opinion that it was not, and thereby denied defendant its rights under that Act (Title 45, U. S. C., Sec. 53). The result of the opinion conflicts with the statute and with *O'Donnell* v. *Elgin, Joliet & E. R. Co.*, 338 U. S. 384, l. c. 393, in which case the plaintiff was seeking to recover both on negligence under the Federal Employers' Liability Act, and violation of the Safety Appliance Act. There, this Court recognized that evidence might be admissible on the charge of negligence under the Federal Employers' Liability Act which would not be admissible under the Safety Appliance Act.

2. Plaintiff's negligence as the sole cause of his injury was a complete defense in the case both to plaintiff's allegation of defendant's negligence under the Federal Employers' Liability Act, and to his allegation of violation by defendant of the Safety Appliance Act. This the Court of Appeals failed to recognize, and thereby denied defendant its rights under those Acts.

Carter v. *Atlanta & St. A. B. R. Co.*, 338 U. S. 430, l. c. 435.

Detroit, T. & I. R. Co. v. *Hahn*, 47 F. 2d 59 (6 Cir.) (Almost identical with the case at bar on the issues involved).

3. The trial court's charge as a whole fairly and clearly submitted the issues in the case to the jury (R. 1, pp. 56 *et seq.*), and the verdict of the jury for defendant was amply supported by the evidence.

The Chicago & N. W. Ry. Co. v. *Whitton*, 13 Wall. 270, l. c. 290.

Affolder v. *N. Y. C. & St. L. R. Co.*, 339 U. S. 96, l. c. 100.

Keller v. *Brooklyn Bus Corp.*, 128 F. 2d 510, l. c. 512 (2 Cir.).

Grand Trunk W. R. Co. v. *W. H. Nelson Co.*, 116 F. 2d 823, l. c. 835 (6 Cir.).

So. Pac. Co. v. *Souza*, 179 F. 2d 691, l. c. 694 (9 Cir.).

U. S. C., Title 28, F. R. C. P., Rule 61.

4. Assumption of risk as a defense was not an issue in the case. It was neither pleaded nor relied on by defendant, and the trial court and defendant's counsel so told the jury (R. 1, pp. 33-36).

5. The charge of the trial court not only did not mention assumption of risk as a defense, or contributory negligence as an issue, but required a verdict for the plaintiff if the jury found insufficiency of the brake and causal connection. A verdict for the defendant could only be returned under the charge if the jury found that plaintiff's negligence was the sole cause of his injury (R. 1, pp. 60, 61).

6. The Court of Appeals misconstrued the sentence quoted in its opinion from the O'Donnell case above, in which this Court said: "But this Court early swept all issues of negligence out of cases under the Safety Appliance Act." This Court, in making that statement, was referring to negligence of the defendant, while the Court of Appeals was discussing plaintiff's contributory negligence, and apparently concluded that the sentence quoted above applied to plaintiff's negligence as the sole cause of his injury (R., pp. 11, 12), as plaintiff's negligence as the sole cause of his injury is not mentioned in the opinion.

7. In two of the Court's criticisms of the trial court's charge, the Court disregarded Rule 51, Federal Rules of Civil Procedure, U. S. C., Title 28, which requires specific objections to the court's charge.

8. If the evidence elicited by defendant on cross examination of plaintiff (R. 1, pp. 33-36) was pertinent on the issue of contributory negligence, which the Court said it might have been if that was an issue in the case (R., pp. 8, 9), then since contributory negligence was an issue in the case, that evidence was properly admitted by the trial court. Also, if that evidence was pertinent on contributory negligence, it was pertinent on the issue of plaintiff's negligence as the sole cause of his injury, which was a defense both to the claim of plaintiff on defendant's negligence under the Federal Employers' Liability Act and on defendant's violation of the Safety Appliance Act.

9. By reason of the foregoing, defendant has been denied its rights under the Federal Employers' Liability Act and the Safety Appliance Act.

Wherefore, petitioner respectfully prays that a writ of certiorari be issued under the seal of this Court, directed to the United States Court of Appeals for the Eighth Circuit, to the end that the judgment of that Court in the cause above mentioned may be reviewed; that upon such review the judgment of that Court may be reversed; and for such other and further relief in the premises as to this Court may seem meet and just.

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CHARLES ELMORE CROPLEY
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In the Supreme Court of the United States

October Term, 1951.

No. 147.

WABASH RAILROAD COMPANY, a Corporation, *Petitioner*,

vs.

GORDON BYLER, *Respondent*.

RESPONDENT'S BRIEF IN OPPOSITION TO THE ISSUANCE OF THE WRIT OF CERTIORARI.

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OPINION OF THE COURT BELOW.

The opinion of the United States Court of Appeals for the Eighth Circuit is officially reported at 196 F. 2d 9 (Advance Sheet of June 16, 1952).

The original proceedings before the United States District Court for the Western District of Missouri, Western Division, consisted of a trial before a jury and were not officially reported.

JURISDICTION.

The jurisdiction of the United States District Court in this cause was founded upon an action arising under the laws of the United States, as provided by 28 U. S. C. A., Sec. 1331, while the United States Court of Appeals exercised its appellate jurisdiction under the provisions of 28 U. S. C. A., Sec. 1291.

Petitioner seeks to invoke the jurisdiction of this Court under the provisions of Sec. 1254, 28 U. S. C. A., upon the inadequate theory that:

> "The judgment of the United States Court of Appeals denies petitioner rights, which it claimed and to which it was entitled, under the Federal Employers Liability Act and the Safety Appliance Act." (P. 13, Petition for Writ of Certiorari.)

QUESTIONS PRESENTED.

Respondent does not consider that under the decisions of this Court, any question is presented by the Petition for Writ of Certiorari which justifies the issuance of the writ prayed for.

> "The question how the court should exercise this power next arises. The jurisdiction to bring up cases by certiorari from the Circuit Courts of Appeal was given for two purposes, first to secure uniformity of decision between those courts in the nine circuits, and second, to bring up cases involving questions of importance which it is in the public interest to have decided by this court of last resort. The jurisdiction was not conferred upon this court merely to give the defeated party in the Circuit Court of Appeals another hearing." *Magnum Import Co.* v. *Coty*, 262 U. S. 159.

STATEMENT OF THE CASE.

Petitioner's "Summary and Short Statement of Matter Involved," consisting of 10½ pages, is deemed argumentative, redundant and irrelevant to the issues it attempts to submit to this Court. It is also confusing for the reason that it goes into lengthy and unnecessary detail on the facts of the case, when the sufficiency of the evidence was not an issue in the Court of Appeals and is not a contention here made by the petitioner.

Respondent adopts the statement of the case from the opinion of the court below, as set forth on page 6 of the record:

> "So far as the issues presented on this appeal are concerned, there is no serious dispute in the evidence and the sufficiency of the evidence is not questioned. Plaintiff at the time of receiving his injuries was employed by defendant as a switchman in defendant's yards at Kansas City, Missouri. He was standing between a string of twelve to fourteen cars to the west of him and a string of three cars attached to the switch engine to the east of him. The three cars were cut off from the engine and permitted to run down grade toward the standing cars. As these three cars passed plaintiff he boarded the stirrup on the ladder at the east end of the east car to climb to the brake platform and apply the brakes because he believed the moving cars were gaining speed too fast and that if not checked they would be going too fast to make a safe coupling. When plaintiff reached the brake platform and applied the hand brake tightly in the usual manner the brake lever slipped on the first application and then he made a second application but the brake failed to slow or stop the moving cars. As the cars collided the impact was such as to throw him from the box car he was on to the ground. There was evidence

from which the jury might have found that had the brake functioned properly the speed of the moving cars would have been slowed down before they collided with the standing cars.

The action was tried before a jury and resulted in a verdict for defendant, and from the judgment entered on the verdict plaintiff prosecutes this appeal. As has been observed, the sufficiency of the evidence is not challenged but plaintiff seeks reversal on the ground that the court erred in admitting certain testimony over his objections and that the court likewise erred in refusing to give certain instructions requested by him and in the giving of certain instructions on its own motion."

The court below sustained the contentions of this respondent (appellant-plaintiff below), and reversed the judgment of the District Court upon the grounds that evidence of assumption of risk was erroneously admitted into evidence (R. 7-10), and because of error in the refusal of the District Court to give certain requested instructions, and because of error in the instructions which were given by the District Court (R. 10-12).

Petitioner does not here question the correctness of the ruling of the Court of Appeals in holding the admission of evidence of assumption of risk to be prejudicially erroneous, but attacks that part of the opinion dealing with instructions, upon which the court below ruled correctly, following the controlling decisions of this Court.

ARGUMENT.

I.

Certiorari should be denied because the petitioner has failed to comply with the rules of this Court; has failed to state reasons and cite authorities relied on for issuance of the writ and because the petitioner has failed to demonstrate the jurisdiction of the Court.

The Petition for Writ of Certiorari in this cause totally fails to state any basis upon which this Court should take jurisdiction to review the judgment in question, as required by Rule 38, paragraph 2, of this Court.

The Petition for Writ of Certiorari totally fails to show in the jurisdictional statement therein, that the nature of this case, and the rulings of the Court of Appeals were such as to bring this case within the jurisdiction of this Court. The petition cites no cases sustaining the jurisdiction of this Court, and fails to include a statement of the grounds upon which it is contended that the questions involved are substantial, all as required by Rule 12, paragraph 1, of this Court.

The Petition for Writ of Certiorari totally fails to state any special or important reasons for the issuance of a Writ of Certiorari in this cause as required by Rule 38, paragraph 5, of this Court.

Aside from the failure of the petition to comply with the rules of this Court, it is further fundamentally deficient because it is barren of reasons or authorities upon which this Court could base the issuance of a Writ of Certiorari.

All of the cases cited in the petition go to the merits of this cause and not to the question of certiorari, which is the only question before the Court at this time.

Respondent deems it unnecessary to further argue petitioner's failure to comply with the rules of this Court, and submits that the failure of the petition to comply with the clear and unambiguous directives of the Court concerning the submission of Petitions for Writs of Certiorari, is sufficient reason for the denial of the petition herein.

II.

Certiorari should be denied because the questions propounded by petitioner have all been answered by the recent controlling decisions of this Court interpreting the Safety Appliance Act and the Federal Employers Liability Act.

The court below, in holding the admission of evidence of assumption of risk in the trial of this cause was prejudicially erroneous and reversible error, followed the provisions of Sections 54 and 55, Title 45, U. S. C. A., and the leading decisions of this Court interpreting said statutes. *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, and *Schlemmer* v. *Buffalo, R. & P. Ry. Co.*, 205 U. S. 1 (R. 9-10). The petition does not state that the opinion of the court below is in conflict with Section 54 or 55, Title 45, U. S. C. A., nor that the opinion of the court below is in conflict with the *Tiller* or the *Schlemmer* decisions of this Court (*supra*).

Section III of the Petition for Writ of Certiorari enumerates 11 questions for the consideration of the Court in the event certiorari is issued. These 11 questions actually propound a total of 18 questions. Some of the questions seem to be rhetorical both in form and substance, while the others patently demonstrate the desire of the petitioner for a mere reargument and rehearing of the case in this Court.

The questions propounded in the petition and the reasons relied on for the issuance of the writ set out in Section IV of the petition strongly indicate that petitioner merely seeks an interpretation or an advisory opinion from this Court explaining the plain and unambiguous language of the opinion of the court below. The petitioner ignores in its petition (as it has throughout the course of this litigation) the proviso of Section 53, 45 U. S. C. A., which provides that no employee shall be held guilty of contributory negligence in a Safety Appliance case.

This Court has gone to great lengths in its recent decisions to clarify the relationship between the Federal Employers Liability Act and the Safety Appliance Act, and to state unequivocally for the benefit of both the courts and the bar that negligence is not an issue in any case under the Safety Appliance Act. We refer specifically to the following cases, all of which were cited and followed in the opinion of the court below:

Affolder v. *New York C. & St. L. R. Co.*, 339 U. S. 96.
Carter v. *Atlanta & St. A. B. R. Co.*, 338 U. S. 430.
O'Donnell v. *Elgin, Joliet & E. R. Co.*, 338 U. S. 384.
Coray v. *Southern Pacific Co.*, 335 U. S. 520.
Myers v. *Reading Co.*, 331 U. S. 477.

We see no reason for this Court to burden itself by assuming jurisdiction in this cause for the purpose of writing an opinion which would be a simple reiteration of the above decisions.

CONCLUSION.

Respondent respectfully urges that there is no reason for review of this cause on certiorari and that the petition states no reason for the issuance of a Writ of Certiorari by this Court.

The petition and the record herein, show that the petitioner has not been denied any of its rights under the Safety Appliance Act and the Federal Employers Liability Act, but seeks to expand and extend its defenses under these laws to avail itself of the common law defenses of assumption of the risk, contributory negligence and causation, which have been prohibited in railroad employee injury cases by legislative enactment and judicial decree for a half century.

For the above reasons and others expressed in the body of this brief, we respectfully submit that the Petition for Writ of Certiorari in this cause should be denied.

Respectfully submitted,

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